89-1319

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARK TARKA, *Petitioner,*

v.

G. CHARLES FRANKLIN, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK TARKA
1016 EAST 38th STREET No. D
AUSTIN, TEXAS 78705-1835
(no telephone service)

Pro se

January 1990

QUESTION PRESENTED

Is the student who attends a university graduate level class as an auditor, but who was rejected for admission to the graduate school, on whom the institution maintains a personal file containing letters of recommendation, a "student" who has a right of access to those letters granted by 20 U.S.C.A. § 1232g?

LIST OF ALL PARTIES

During the proceedings, the petitioner, Mark Tarka, was the plaintiff-appellant. The respondents, G. Charles Franklin, Alan Campion, William H. Cunningham, Francie A. Frederick, James A. Holcombe, William S. Livingston, Thomas E. Mallouk, Stephen A. Monti, and Patricia C. Ohlendorf, were the defendant-appellees.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARK TARKA, *Petitioner*,

v.

G. CHARLES FRANKLIN, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Mark Tarka, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on December 29,1989.

OPINIONS OF THE LOWER COURTS

The opinion of the Court of Appeals for the Fifth Circuit is reported at 891 F.2d

102, and is reprinted in the appendix of this petition, pages A-1 to A-19.

The order and opinion of the District Court for the Western District of Texas, Austin Division, is reprinted in the Appendix, pages A-20 to A-49.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1989. The clerk of the court does not note the time of entry. No rehearing was requested. This Court obtains jurisdiction to review the judgment by writ of certiorari through 28 U.S.C.A. §§ 1254(1), 1651(a), 2106, and 2111.

STATUTE AND REGULATION INVOLVED

The Family Educational Rights & Privacy Act of 1974 ("FERPA"; "Buckley Amendment"; "Buckley/Pell Amendment") defines "student" with the following statement:

> [T]he term "student" includes any person with respect to whom an educational agency or institution maintains education

records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C.A. § 1232g(a)(6) (1978).

The Secretary of Education defines "student" with the following provision:

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.
(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

34 C.F.R. § 99.3 "Student" (1986).

STATEMENT OF THE CASE

Constitutionality of 20 U.S.C.A. § 1232g is not in dispute. The fundamental issue in this case is expressed by the question

stated on page i. Specific facts, law, regulation and legislative history are published in the appended opinions. Because the normal legislative process was not followed for the FERPA, a "Joint Statement in Explanation of the Buckley/Pell Amendment" by Senators Buckley and Pell was published at 120 *Cong.Rec.* 39862 in order to assist the implementation of the law. The FERPA mandates that educational agencies and institutions will lose funding controlled by the Secretary of Education for failures to:

(1) provide parents and eligible students access to the student's records;

(2) provide parents and eligible students the opportunity to challenge records to correct or delete inappropriate data, and to insert explanatory statements;

(3) obtain the consent of parents or eligible students prior to the release of records to most third

parties; and

(4) inform parents and students of their rights under the law.

20 U.S.C.A. §§ 1232g(a)(1)(A), (a)(2), (b)(1) and (b)(2), and (e) (1978). *See also* § 1232g(d). The Act is remedial legislation, designed to generally provide for "fair-play". Its intent is expressed by Senator Buckley. 120 Cong.Rec.14580, col. 1, to 14581, col. 1 (1974).

Petitioner was an auditing student in the graduate school at the University of Texas at Austin during the Fall Semester of 1986. Appendix, A-15. *See also* Appellant's Brief, page 32. He had sought access to letters of recommendation allegedly used to deny his formal admission to a graduate program. A request was made pursuant to 20 U.S.C.A. § 1232g(a)(2). The request was denied. All actions in the state courts failed to reach the merits of the case. Federal court jurisdiction was invoked as a federal question. 28 U.S.C.A. § 1331. *Ex*

post facto regulatory interpretation was used in the federal suit to deny access and assert the defense of official immunity. Appendix, A-18, lines 13 to 16.

Petitioner relies upon the statutory language, legislative intent and history, Appellant's Brief, pages 7 to 25, and a paragraph from the joint statement:

> With regard to letters of recommendation . . . . [F]urther clarifications are included . . . . [T]he "student" to whom the right of access belongs is defined as any person concerning whom the educational agency maintains education records or personal information, but does not include anyone who has not been in attendance at such agency or institution . . . . . For the purpose of this definition, a student who is only auditing a course, but on whom the institution maintains a personal file, would be included in the Amendment's coverage.

120 *Cong.Rec.* 39863, col. 2, par. 1 . *See* Appendix, A-14. Petitioner compares the dissected paragraph to the statutory language defining "student", *supra*, page 2, and argues that the sponsors of the legislation intended the auditing student

to enjoy the full rights of the FERPA. The clarification specifically announces who it is that has access to letters of recommendation. Congress obviously employs the definition developed in the courts:

> One may be a student at a college or university without being matriculated, as where he attends recitations and lectures and is under the government of the university.

14 *C.J.S.* "Colleges and Universities" § 24 (1939). Petitioner has suggested that Congress requires a rejected applicant to be physically present to make a challenge in order to avoid the expense and burdens of challenges made through the postal system. The implementing regulation only provides for on-campus hearings. 34 C.F.R. § 99.22 (1986).

The Respondents, and the Department of Education, rely only upon two sentences from the same paragraph of the joint statement:

> This means that the rejected applicant for admission is not given the right under the Buckley Amendment to see and challenge his letters of recommendation, nor does the amendment give him the right to challenge the institution's decision not to admit him. Such a right accrues only to the individual who actually attends the institution.

120 *Cong.Rec.* 39863, col. 2, par. 1. *See* Appendix, A-14. It is argued that this passage in and of itself indicates Congressional intent to prohibit access to letters of recommendation by rejected applicants, regardless of whether or not they attend the institution in some other manner. *See* Appendix, A-16 to A-18. Restriction of the rights of auditors who attend is also based on this passage. *See* Appendix, A-18, line 7, *et seq.*

REASONS FOR ALLOWANCE OF THE WRIT

The decisions of the lower courts are not in keeping with the intent and history of the law. It is required that the administration of justice be done agreeably to the Constitution and laws of the United

States. 28 U.S.C.A. § 453. *See generally* 1 *Fed.Prac.Dig. 3d* "Administrative Law", pages 403 to 412; 98 *id.* "Statutes", pages 101 to 240. If the Supreme Court does not undertake a review of this issue, the opinions below will become as law for the purposes of policy of the institutions of higher education and two absurdities will be allowed to stand: (1) that Congress grants the rights to challenge letters of recommendation and a decision not to admit only to students who have been admitted; and (2) that expressly enumerated legal ~~rights~~ of auditing students at institutions of postsecondary education will be denied by regulatory decree.

Respectfully submitted,

MARK TARKA
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(no telephone service)

Pro se

January, 1990

Mark TARKA, Plaintiff-Appellant,

v.

G. Charles FRANKLIN, et al.,

Defendants-Appellees.

No. 89-1161

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Dec. 29, 1989.

Appeal from the United States District Court for the Western District of Texas.

Before GEE, DAVIS and JONES, Circuit Judges.

PER CURIUM:

The major issue in this case is whether appellant was a "student" at the University of Texas at Austin for purposes of gaining access to his admission file there in accordance with the Family Educational

Rights & Privacy Act of 1974 ("FERPA") 20 U.S.C. § 1232g. We agree with the district court's conclusion that a person whose application to the Graduate School of the University of Texas has been rejected, but who nevertheless audited some classes at the University is not a "student" as defined by FERPA, 20 U.S.C. § 1232g(a)(6). We adopt and reproduce below the pertinent portions of the district court's opinion dealing with the issue: [1]

The facts which give rise to the filing of this lawsuit occurred in the Fall of 1986. At that time, Plaintiff submitted an application for admission to the Graduate School of the University of Texas at Austin, Department of Chemistry. As a part of his application, Plaintiff submitted three letters of recommendation which he solicited from faculty members of the

1. Because we reject Tarka's right of access to the recommendation letters founded on FERPA, it follows that the defendants have not shed their qualified immunity from suit for denying that

chemistry department at South Dakota State University. On September 2, 1986, Plaintiff was informed that he was denied admission. This denial of admission compelled the Plaintiff to commence efforts to obtain access to his entire application file and the letters of recommendation which Plaintiff, with the benefit of hindsight, never should have solicited nor submitted with his application.

The Plaintiff began his journey by sending written inquiries directly to University administrators. He continued his quest with the filing and prosecution of a lawsuit through the entire state court system. He eventually filed a Complaint in federal court which led to the compilation of a voluminous summary judgment record

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access. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985). We affirm the district court's discretionary decision to dismiss Tarka's state law claims. We do not consider his "due process" argument concerning the recommendation letters, for Tarka did not brief or argue that issue in our court.

before this Court. While the Court is impressed with the Plaintiff's perseverance, the Court must adhere to applicable principles of law and reject Plaintiff's efforts to determine the contents of the recommendation letters.

As stated earlier, Plaintiff contacted various University officials requesting access to his application file. He was initially denied access to his file, but subsequently received an edited copy of the file in accordance with the Texas Open Records Act, TEX.REV.CIV.STAT.ANN. 6252-17a, ("TORA"). Plaintiff, being unsatisfied with this result, then filed suit seeking access and monetary compensation in the 250th Judicial District Court of Travis County, against at least four of the University officials named in this federal action. The state action was dismissed on jurisdictional grounds relating to the doctrine of official

immunity. Plaintiff appealed his case to the Texas Supreme Court without success.

After being rejected in state court, Plaintiff commenced the present litigation alleging causes of action under:

(1) the Family Educational Rights & Privacy Act of 1974 ("FERPA"), codified at 20 U.S.C. § 1232g;

(2) the Civil Rights Act of 1841, codified at 42 U.S.C. § 1983;

(3) the TORA;

(4) the Fifth and Fourteenth Amendments of the United States Constitution; and

(5) the Texas Constitution, Art. 1, sec. 19.

. . . . .

Under the Federal Rules of Procedure, the Court may only grant summary judgment if, when viewing the evidence most favorably to the nonmoving party and indulging all reasonable inferences in favor of that party, the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). *Celotex Corp. v. Catrett* [477 U.S. 317], 106 S. Ct. 2548, 2552-53 [91 L.Ed.2d 265] (1986); *Russell v. Harrison*, 736 F.2d 283, 287 (5th Cir.1984). As stated by the Supreme Court in Celotex:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. In order to determine which factual issues are material, the Court must first examine the substantive law that governs the case, and to determine if an issue of

material fact is genuine, the Court must then decide whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242], 106 S.Ct. 2505, 2510 [,91 L.Ed.2d 202] (1986).

III. ANALYSIS

A. *FERPA Rights*

In Plaintiff's Second Amended Complaint ("Complaint"), Plaintiff alleges that the actions of the Defendants in denying access to Plaintiff's application constitute a violation of FERPA. FERPA was designed primarily to regulate the release of student records. A student's or parent's consent is required where personally identifiable information from the educational records of a student is to be disclosed. The Secretary of Education is empowered to enforce the various provisions

of FERPA. 20 U.S.C. § 1232(g)(f).[2] An educational agency or institution that unlawfully releases a student's record may lose federal funding. 20 U.S.C. § 1232g(b)(1). This is the only express remedy provided in the statute. The Fifth Circuit has found that FERPA does not explicitly provide for a private cause of action and that its legislative history does not indicate that the drafters of the legislation intended for there to be one. *Klein Independent School District v. Mattox,* 830 F.2d 576,579 (5th Cir.1987), *cert. denied,* [__U.S.__,] 108 S.Ct. 1473, [99 L.Ed.2d 702] (1988). Other circuits have found more definitively that no private cause of action, either explicitly or implicitly, was created or intended. *See Fay v. South Colonie Century School*

2. In this case, the record indicates that the Department of Education informed Plaintiff that FERPA did not entitle him to have access to the requested materials and that it would thus be unable to intercede on his behalf. *See* Plaintiff's Second Amended Complaint, Exhibit P-46(b), paragraph two.

District [sic], 802 F.2d 21, 33 (2nd Cir.1986); *Girardier v. Webster College,* 563 F.2d 1267, 1277 (8th Cir.1977) (both cases cited with approval in *Klein*). This Court finds therefore that a private cause of action does not exist under FERPA.

B. *42 U.S.C. § 1983*

In order for Plaintiff to recover on his claims under 42 U.S.C. § 1983, he must establish two vital elements: (1) that he has been deprived of a right "secured by the Constitution and the laws" of the United States; and (2) that the persons depriving him of this right acted "under color of any statute" of the State of Texas. *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 155 [, 98 S. Ct. 1729, 1732, 56 L.Ed.2d 185] (1978); *Roberts v. Louisiana Downs, Inc.,* 742 F.2d 221,223 (5th Cir.1984).

. . . .

2. *FERPA claim*

Plaintiff alleges in his complaint as an alternative basis for a section 1983 violation that Defendant's actions constitute a violation of Plaintiff's rights under FERPA.

. . . . .

Plaintiff also sues these Defendants in their official capacity as administrators, professors, and counsel for the University of Texas. In his motion for partial summary judgment, Plaintiff concedes that there exists no genuine issue of material fact which prevents the Court from deciding by summary judgment whether he falls within the class of individuals entitled to the rights afforded by the FERPA provisions governing this case. In Defendants' Motion for Dismissal and/or Summary Judgment, Defendants also seek a summary judgment determination of Plaintiff's rights under FERPA for purposes of resolving Defendants' liability, if any, under 42 U.S.C. § 1983.

The Court therefore shall consider on the basis of the summary judgment record presented on this issue whether as a matter of law Defendants violated section 1983 by depriving Plaintiff of his FERPA rights. In this respect, the parties agree that the primary question is whether Plaintiff was a "student" at the time he was denied access to the letters as that term is defined in FERPA.

FERPA grants parents of students, students over 18 years of age, and students attending an institution of post-secondary education the right to access and review educational records relating to him subject to certain exceptions. *See* 20 U.S.C. § 1232g(a)(1)(A), (a)(2) and (d); *see also* 34 C.F.R. §§ 99.11-.12.

Initially, the University denied Plaintiff access to his files because he had allegedly signed a waiver of his right of

access pursuant to 20 U.S.C. § 1232g(a)(1)(B)(iii). Defendants subsequently abandoned this position and instead denied Plaintiff access to his file on the grounds that he was not a "student" as defined by federal regulations duly promulgated under FERPA by the Secretary of Education.

As stated earlier, the Court must decide whether Plaintiff is a "student" for purposes of FERPA. The statute itself defines "student" with the following statement:

> [T]he term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C. § 1232g(a)(6). Pursuant to the authority granted under subsection (c) of FERPA, the Secretary of Education has adopted regulations for implementing the Act. *See* [34] C.F.R. § 99.1, *et seq.*

These regulations further define the term "student" in the following provision:

> 'Student' (a) includes any individual with respect to whom an educational agency or institution maintains education records.
>
> (b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

34 C.F.R. § 99.3. "Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program. *Id.*

The legislative history of FERPA, which is also known as the Buckley/Pell Amendment,

sheds further light on the meaning of the term "student" and on a "student's" right to see and challenge letters of recommendation. 120 CONG. REC. 539862 [sic], *Joint Statement in Explanation of Buckley/Pell Amendment* (Dec. 13, 1974). That provision specifically stated that:

> With regard to letters of recommendation for a student in an institution of postsecondary education, two further clarifications are included. The use of confidential recommendations is limited solely to the purpose for which they were specifically intended. Such recommendations should not become a party [sic] of the student's on-going file and serve as a basis for continued official decision-making for purposes other than for which such letters were originally submitted. Second, the "student" to whom the right of access belongs is defined as any person concerning whom the educational agency maintains education records of [sic] personal information, but does not include anyone who has not been in attendance at such agency or institution. This means that the rejected applicant for admission is not given the right under the Buckley Amendment to see and challenge his letters of recommendation, nor does the amendment give him the right to challenge the institution's decision not to admit him. Such a right accrues only to the individual who actually attends the institution. For the purpose of this definition, a student who is only auditing a course, but on whom the

> institution maintains a personal file, would be included in the Amendment's coverage.

Id., 120 CONG.REC. at 39863, col. 2, par. 1. Plaintiff's claim for relief under section 1983 is mostly founded upon the language regarding auditing students contained in the above-quoted passage. The record in this case indicates that Plaintiff had audited some courses offered at the University during the following semesters: Fall, 1986; Spring, Summer, and Fall, 1987; and, Spring and Summer, 1988. In addition to certain math and language courses, Plaintiff had obtained permission from the University to audit a graduate chemistry course, identified as CH391, *Advanced Topics in Organic Chemistry*, during each semester since the Spring semester of 1987. In the Fall semester of 1987, Plaintiff audited another graduate chemistry course, identified as CH381M, *Advanced Analytical Chemistry*. Despite having audited these courses, Plaintiff has

never been admitted to or formally enrolled in the Graduate School of the University of Texas. Moreover, in the 1988 Spring Semester, Plaintiff did enroll as an undergraduate "Degree Holder but Nondegree Seeker" in the College of Natural Sciences. Plaintiff attempted to enroll in CH391 but subsequently withdrew in February 1988 upon the University's instructions since he did not have graduate standing, a prerequisite for enrollment in a course offered by the Graduate School.

Because Plaintiff audited these courses, he contends that he was "student" in "attendance" for purposes of FERPA since its legislative history indicates that "a student who is only auditing a course, ..., would be included in [FERPA's] coverage." 120 CONG.REC. at 39863, col. 2, par. 1. Defendants have adopted a different interpretation of FERPA, its legislative history and its implementing regulations as

they relate to the rights of an auditing student on the basis of advisory letters solicited from the Director of the Student and Family Education Rights and Privacy Office. This office is located within the United States Department of Education, the agency which Congress authorized to implement and enforce FERPA. The Court, after reviewing FERPA, its legislative history and the pertinent regulations, as well as case law interpreting FERPA, finds that the Defendants' interpretation is consistent with the underlying purpose of FERPA and congressional intent.

The legislative history makes it clear that Congress specifically did not intend in the first place to give rights of access to letters of recommendation to rejected applicants for admission. Congress also did not intend to give the rejected applicant the right to challenge the school's decision not to admit him.

Congress, in effect, did not want a rejected applicant to have the right to access information contained in his application file such as letters of recommendation for the purpose of challenging either the letters or the rejection decision as a whole. The legislative history also indicates, however, that auditing students were entitled to some protection under FERPA, The specific rights afforded to auditing students under FERPA are not expressly enumerated. The Student and Family Education Rights and Privacy Office, in an attempt to resolve this ambiguity, takes a position advocated by the Defendants. Defendants argue that a rejected applicant who is accepted for auditing in the department or school which denied him formal admission may access grades or other information regarding the audited courses but not information regarding the school's rejection decision.

An individual who audits a course is not in the same position as one who has been granted formal admission. The auditing student is granted permission to visit a class but is not granted the rights and obligations accorded a registered and fully-admitted student. An auditing student also cannot receive a grade or participate in classroom discussion of course work. In view of these differences, the Court believes that a rejected applicant who receives permission to audit a course does not have the right to access admission information which is afforded to a student in attendance.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

MARK TARKA	§	
	§	
VS.	§	CIVIL NO.A-88-CA-71
	§	
G. CHARLES FRANKLIN, et al.	§	

ORDER

Before the Court for consideration are the following dispositive motions which have been filed in the above-styled and numbered cause:

1. Defendants' Motion for Dismissal and/or Summary Judgment filed February 5, 1988;

2. Plaintiff's Motion for Partial Summary Judgment filed February 16, 1988; and

3. Defendants' Motion to dismiss Plaintiff's Amended Complaint filed April 22, 1988.

Plaintiff filed an initial response to Defendant's February 5, 1988 Motion on February 12, 1988 which he then supplemented on March 7, 1988. Defendant

G. Charles Franklin[1] filed a response to Plaintiff's Motion on February 26, 1988. Plaintiff filed a response to Defendants' April 22, 1988 Motion on April 28, 1988.

The Court, after reviewing each of the Motions listed above, the responses thereto, and the entire record in this cause, finds that Plaintiff's Second Amended Complaint should be dismissed in part, and alternatively, that summary judgment should be entered in favor of all Defendants. Plaintiff should therefore receive a take-nothing judgment on all the claims he has asserted in this lawsuit.

I. BACKGROUND

The facts which give rise to the filing of this lawsuit occurred in the Fall of 1986. At that time, Plaintiff submitted an application for admission to the Graduate

1. Plaintiff initially named only G. Charles Franklin in his Complaint filed January 15, 1988. On March 4, 1988, the Court granted Plaintiff's motions for leave to name the additional Defendants listed in the style of this action.

School of the University of Texas at Austin, Department of Chemistry. As a part of his application, Plaintiff submitted three letters of recommendation which he solicited from faculty members of the chemistry department at South Dakota State University. On September 2, 1986, Plaintiff was informed that he was denied admission. This denial of admission compelled the Plaintiff to commence efforts to obtain access to his entire application file and the letters of recommendation which Plaintiff, with the benefit of hindsight, never should have solicited nor submitted with his application.

The Plaintiff begin his journey by sending written inquiries directly to University administrators. He continued his quest with the filing and prosecution of a lawsuit through the entire state court system. He eventually filed a Complaint in federal court which led to the compilation of a voluminous summary judgment record

before this Court. While the Court is impressed with Plaintiff's perseverance. the Court must adhere to applicable principles of law and reject Plaintiff's efforts to determine the contents of the recommendation letters.

As stated earlier, Plaintiff contacted various University officials requesting access to his application file. He was initially denied access to his file, but subsequently received an edited copy of the file in accordance with the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. 6252-17a, ("TORA"). Plaintiff, being unsatisfied with this result, then filed suit seeking access and monetary compensation in the 250th Judicial District Court of Travis County, Texas, against at least four of the University officials named in this federal action. The state action was dismissed on jurisdictional grounds relating to the doctrine of official immunity. Plaintiff appealed his

case to the Texas Supreme Court without success.

After being rejected in state court, Plaintiff commenced the present litigation alleging causes of action under:

(1) the Family Educational Rights & Privacy Act of 1974 ("FERPA"), codified at 20 U.S.C. § 1232g;

(2) the Civil Rights Act of 1841, codified at 42 U.S.C. § 1983;

(3) the TORA;

(4) the Fifth and Fourteenth Amendments of the United States Constitution; and

(5) the Texas Constitution, Art. 1, sec. 19.

The Plaintiff initially sought a temporary restraining order and preliminary injunction which would enjoin Defendant Franklin and his agents from unlawfully denying Plaintiff access to his file. The Court denied both requests. The Court further ordered on May 27, 1988 that discovery be stayed pending the resolution of Defendants' claims of immunity. Upon

consideration of Defendants' claims of immunity, and after the filing of a Second Amended Complaint by Plaintiff on June 6, 1988, the Court now considers Plaintiff's and Defendants' requests for summary judgment.

II. STANDARD OF REVIEW

Under the Federal Rules of Procedure, the Court may only grant summary judgment if, when viewing the evidence most favorably to the nonmoving party and indulging all reasonable inferences in favor of that party, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986); Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984). As stated by the Supreme Court

in Celotex:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. In order to determine which factual issues are material, the Court must first examine the substantive law that governs the case, and to determine if an issue of material fact is genuine, the Court must then decide whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986).

III. ANALYSIS

A. FERPA Rights

In the Plaintiff's Second Amended Complaint ("Complaint"), Plaintiff alleges that the actions of the Defendants in denying access to Plaintiff's application constitute a violation of FERPA. FERPA was designed primarily to regulate the release of student records. A student's or parent's consent is required where personally identifiable information from the education records of a student is to be disclosed. The Secretary of Education is empowered to enforce the various provisions of FERPA. 20 U.S.C. § 1232g(f).[2] An educational agency or institution that unlawfully releases a student's record may lose federal funding. 20 U.S.C. § 1232g(b)(1). This is the only express remedy provided in the statute. The Fifth Circuit has found that FERPA does not

2. In this case, the record indicates that the Department of Education informed Plaintiff that FERPA did not entitle him to have access to the requested materials and that it would thus be unable to intercede on his behalf. See Plaintiff's Second Amended Complaint, Exhibit P-46(b), paragraph two.

explicitly provide for a private cause of action and that its legislative history does not indicate that the drafters of the legislation intended for there to be one. Klein Independent School District v. Mattox, 830 F.2d 576, 579, (5th Cir. 1987); cert. denied, 108 S.Ct. 1473 (1988). Other circuits have found more definitively that no private cause of action, either explicitly or implicitly, was created or intended. See Fay v. South Colonie Century School District [sic], 802 F.2d 21, 33 (2nd Cir. 1986); Girardier v. Webster College, 563 F.2d 1267, 1277 (8th Cir. 1977) (both cases cited with approval in Klein[]). This Court finds therefore that a private cause of action does not exist under FERPA.

B. 42 U.S.C. § 1983

In order for Plaintiff to recover on his claims arising under 42 U.S.C. § 1983, he must establish two vital elements: (1) that he has been deprived of a right

"secured by the Constitution and the laws" of the United States; and (2) that the persons depriving him of this right acted "under color of any statute" of the State of Texas. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Roberts v. Louisiana Downs, Inc., 742 F.2d 221, 223 (5th Cir. 1984).

1. Due process claim

Plaintiff alleges that various acts by the Defendants deprived him of his fundamental right to due process. In his Second Amended Complaint, Plaintiff makes several references to an alleged denial of his due process rights. First, he claims that he has a property interest in his "education records" allegedly created by FERPA and TORA §§ 3(a)(14) and 14(e). Defendants' refusal to show Plaintiff the letters "for rebuttal" have allegedly violated "all due process considerations and fair-play." Plaintiff's Second Amended

Complaint, §V, p. 10. He further claims that Defendants have denied him access to the letters in furtherance of a conspiracy among University officials to retaliate against Plaintiff for a scientific article published by the Plaintiff. Id., pp. 11, 14, 15, and 16. Plaintiff reiterates his "fair play" argument in section IX, p. 17 in which he states:

> The denial of this access to the letters violates the theory of fair play expressed in the fundamental due process principle as a right to refute evidence or testimony unfavorable to the individual affected by such evidence or testimony.

Plaintiff makes these allegations of due process violations throughout his complaint in addition to others not enumerated herein, all on the assumption that he is entitled to due process protection. The issue for the Court therefore is whether Plaintiff has a constitutionally-protected property interest or entitlement to review letters of recommendation which he asked be

submitted with his application to the Defendants' graduate school program.

The United States Supreme Court has stated that "the requirement[s] of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569 (1972). It is clear that not all interests in property are entitled to due process protection. In order for Plaintiff to succeed on his claim having a property interest in reviewing the letters of recommendation, he must show that he has more than an abstract need or desire for it and more than a unilateral expectation of it. "He must, instead, have a legitimate claim of entitlement to it. It is a purpose of an ancient institution of property to protect those claims upon which people rely in their daily lives. . . ." Roth, 408 U.S. at 577. Property interests are created and their dimensions

defined by existing rules or understanding that stem from an independent source, such as state law, that secure certain benefits and that support claims of entitlement. Id. The Supreme Court has identified various property interests which are entitled to due process: welfare benefits, Goldberg v. Kelley, 397 U.S. 254 (1970); tenured employment, Slochower v. Board of Education, 350 U.S. 551 (1956); and contractual employment, Weiman v. Updegraff, 344 U.S. 183 (1952). To determine, therefore, whether due process requirements apply in the first place, the Court must look not at the weight but to the nature of the interest at stake and decide whether the interest is within the Fourteenth Amendment's protection of liberty and property.

Plaintiff contends that the Texas Open Records Act, TEX, REV. CIV. STAT. ANN. art. 6252-17a (Vernon 1988) grants him a statutory right to review the controverted

letters of recommendation. Defendants, on the other hand, argue that the inter/intra-agency communication exemption, applies to the letters thereby eliminating any statutory entitlement to have access to the letters.

Assuming, arguendo, that Plaintiff does have such a right, the Court is unable to conclude, after examining the nature of that right, that it rises to the level encompassed by the Due Process Clause. The right to review letters of recommendation which Plaintiff voluntarily solicited for submission with his application, in the Court's view, does not fall within the category of "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.["] Roth, 408 U.S. at 573. The Defendants' refusal to allow access to the letters does not affect Plaintiff's right to contract, right to engage in any of the common occupations of life, right to

acquire useful knowledge, right to marry, establish a home and bring up children. Nor does it affect Plaintiff's right to worship God according to the dictates of his own conscience. Id. It is important to note that Plaintiff does not and cannot challenge on any constitutional basis the Defendants' rejection of his application for admission. Rather, Plaintiff challenges Defendants' refusal to allow him to review letters of recommendation which Defendants allegedly relied upon in deciding to deny Plaintiff admission. Plaintiff's subjective belief that this denial of access restricts his ability to assess future educational opportunities, to apply to other universities, or to seek employment does not adequately substantiate the need for constitutional protection of an alleged statutory right to review letters of recommendation. Under these circumstances, the Court finds as a matter of law that Plaintiff's claim of a due

process violation fails in the absence of a[n] interest which warrants constitutional due process protection.

2. FERPA claim

Plaintiff alleges in his complaint as an alternative basis for a section 1983 violation that Defendants' actions constitute a violation of Plaintiff's rights under FERPA. Before addressing the substantive aspects of this claim, the Court must resolve questions of qualified immunity which arise since Plaintiff sues the Defendants for money damages in both their official and individual capacities. Under the doctrine of "qualified immunity," public officials who perform discretionary functions are immune from civil damages for conduct that does not violate clearly established constitutional or statutory rights. This immunity protects such officials from suit as well as liability. Del A. v. Edwards, No. 88-3154, (5th Cir.

Sept. 28, 1988)(citing Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Mitchell v. Forsythe, 472 U.S. 511 (1985)); see also Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). The Supreme Court has held that the proper focus of our review on the question of qualified immunity should be whether the alleged conduct violated "legal principals that were 'clearly established'" at the time. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987). To decide whether these Defendants are entitled to qualified immunity, the Court must determine whether an objectively reasonable official would understand that the alleged improper actions were unlawful. If so, these Defendants are not entitled to qualified immunity. Edwards, No. 88-3154, slip op. at 5812.

Plaintiff argues that Defendants violated clearly established law when they denied him access to the three letters of recommendation. Plaintiff has failed to

demonstrate that such a denial did in fact violate clearly established law. He argues that a violation of FERPA occurred based on his own interpretation of the statute and 120 (30) Congressional Record 39863, col. 2, par. 1. Without citing any supporting case law or other official publication, Plaintiff believes that his interpretation is the only valid interpretation of the statute. Defendants, on the other hand, demonstrated that the question of whether FERPA required Defendants to grant Plaintiff access was not clearly established at the time access was denied. Defendants relied on their interpretation of applicable FERPA provisions, regulations promulgated thereunder found at 34 C.F.R. 991 [sic], et sec. and advisory opinions which Defendants solicited from the Family Educational Rights and Privacy Act Office in Washington, D.C., which has been statutorily authorized to enforce FERPA. Defendants' narrow interpretation of FERPA

is justified in light of FERPA's statutory purpose of preventing the careless release of student records. In the absence of a violation of clearly established law, Defendants are entitled to qualified immunity and dismissal of Plaintiff's claims for money damages against the Defendants in their individual capacities is proper. Brown v. Texas A&M University, 804 F.2d 327 (5th Cir. 1986).

Plaintiff also sues these Defendants in their official capacity as administrators, professors, and counsel for the University of Texas. In his motion for partial summary judgment, Plaintiff concedes that there exists no genuine issue of material fact which prevents the Court from deciding by summary judgment whether he falls within the class of individuals entitled to the rights afforded by the FERPA provisions governing this case. In Defendants' Motion for Dismissal and/or Summary Judgment, Defendants also seek a summary judgment

determination of Plaintiff's rights under FERPA for purposes of resolving Defendants' liability, if any, under 42 U.S.C. § 1983. The Court therefore shall consider on the basis of the summary judgment record presented on this issue whether as a matter of law Defendants violated section 1983 by depriving Plaintiff of his FERPA rights. In this respect, the parties agree that the primary question is whether Plaintiff was a "student" at the time he was denied access to the letters as that term is defined in FERPA.

FERPA grants parents of students, students over 18 years of age, and students attending an institution of post-secondary education the right to access and review educational records relating to him subject to certain exceptions. See 20 U.S.C. § 1232g(a)(1)(A), (a)(2) and (d); see also 34 C.F.R. §§ 99.11-.12.

Initially, the University denied Plaintiff access to his files because he

had allegedly signed a waiver of his right of access pursuant to 20 U.S.C. §1232g(a)(1)(B)(iii). Defendants subsequently abandoned this position and instead denied Plaintiff access to his file on the grounds that he was not a "student" as defined by federal regulations duly promulgated under FERPA by the Secretary of Education.

As stated earlier, the Court must decide whether Plaintiff is a ["]student" for purposes of FERPA. The statute itself defines "student" with the following statement:

> [T]he term 'student" [sic] includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

20 U.S.C. §1232g(a)(6). Pursuant to the authority granted under subsection (c) of FERPA, the Secretary of Education has adopted regulations for implementing the

Act. See C.F.R. § 99.1, et sec. These regulations further define the term "student" in the following provision:

> 'Student' (a) includes any individual with respect to whom an educational agency or institution maintains educational records.
>
> (b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

34 C.F.R. § 99.3 "Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program. Id.

The legislative history of FERPA, which is also known as the Buckley/Pell

Amendment, sheds further light on the meaning of the term "student" and on a "student's" right to see and challenge letters of recommendation. 120 CONG. REC. 539862 [sic], Joint Statement inExplanation of Buckley/Pell Amendment [sic] (Dec. 13, 1974). That provision specifically states that:

> With regard to letters of recommendation for a student in an institution of postsecondary education, two further clarifications are included. The use of confidential recommendations is limited solely to the purpose for which they were specifically intended. Such recommendations should not become a part of the student's on-going file and serve as a basis for continued official decision-making for purposes other than for which such letters were originally submitted. Second, the "student" to whom the right of access belongs is defined as any person concerning whom the educational agency maintains education records of [sic] personal information, but does not include anyone who has not been in attendance at such agency or institution. This means that the rejected applicant for admission is not given the right under the Buckley Amendment to see and challenge his letters of recommendation, nor does the amendment give him the right to challenge the institution's decision not to admit him. Such a right accrues only to the individual who actually attends the institution. For the purpose of this

> definition, a student who is only auditing a course, but on whom the institution maintains a personal file, would be included in the Amendment's coverage.

Id., 120 CONG. REC. at 39863, col. 2, par. 1. Plaintiff's claim for relief under section 1983 is mostly founded upon the language regarding auditing students contained in the above-quoted passage. The record in this case indicates that Plaintiff had audited some courses offered at the University during the following semesters: Fall, 1986; Spring, Summer, and Fall, 1987; and, Spring and Summer, 1988. In addition to certain math and language courses, Plaintiff had obtained permission from the University to audit a graduate chemistry course, identified as CH391, Advanced Topics in Organic Chemistry, during each semester since the Spring semester of 1987. In the Fall semester of 1987, Plaintiff audited another graduate chemistry course, identified as CH381M, Advanced Analytical Chemistry. Despite

having audited these courses, Plaintiff has never been admitted to or formally enrolled in the Graduate School of the University of Texas. Moreover, in the 1988 Spring Semester, Plaintiff did enroll as an undergraduate "Degree Holder but Nondegree Seeker" in the College of Natural Sciences. Plaintiff attempted to enroll in CH391 but subsequently withdrew in February 1988 upon the University's instructions since he did not have graduate standing, a prerequisite for enrollment in a course offered by the Graduate School.

Because Plaintiff audited these courses, he contends that he was "student" in "attendance" for purposes of FERPA since its legislative history indicates that "a student who is only auditing a course, . . ., would be included in [FERPA's] coverage." 120 CONG. REC. at 39863, col. 2, par. 1. Defendants have adopted a different interpretation of FERPA, its legislative history and its implementing

regulations as they relate to the rights of an auditing student on the basis of advisory letters solicited from the Director of the Student and Family Education Rights and Privacy Office. This office is located within the United States Department of Education, the agency which Congress authorized to implement and enforce FERPA. The Court, after reviewing FERPA, its legislative history and the pertinent regulations, as well as case law interpreting FERPA, finds that the Defendants' interpretation is consistent with the underlying purpose of FERPA and congressional intent.

The legislative history makes it clear that Congress specifically did not intend in the first place to give rights of access to letters of recommendation to rejected applicants for admission. Congress also did not intend to give the rejected applicant the right to challenge the school's decision not to admit him.

Congress, in effect did not want a rejected applicant to have the right to access information contained in his application file such as letters of recommendation for the purpose of challenging either the letters or the rejection decision as a whole. The legislative history also indicates, however, that auditing students were entitled to some protection under FERPA. The specific rights afforded to auditing students under FERPA are not expressly enumerated. The Student and Family Education Rights and Privacy Office, in an attempt to resolve this ambiguity, takes a position advocated by the Defendants. Defendants argue that a rejected applicant who is accepted for auditing in the department or school which denied him formal admission may access grades or other information regarding the audited courses but not information regarding the school's rejection decision.

An individual who audits a course is not

in the same position as one who has been granted formal admission. The auditing student is granted permission to visit a class but is not granted the rights and obligations accorded a registered and fully-admitted student. An auditing student also cannot receive a grade or participate in classroom discussion of course work. In view of these differences, the Court believes that a rejected applicant who receives permission to audit a course does not have the right to access admission information which is afforded to a student in attendance.

Defendants argue in the alternative that the regulations support their position because 34 C.F.R. § 99.3 limits the definition of "student" such that:

> A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education,

> is not considered to be a student with respect to the component to which an application for admission has been made.

The Court agrees with the Defendants and is of the view that a person, such as the Plaintiff, who has been denied admission as a graduate student in a particular division of a post-secondary school but who is later granted permission to audit courses at the school should not be considered a "student" with respect to the graduate school component unit. Congress could not have intended to allow a rejected applicant to circumvent the strong policy of restricted access to admission information by simply becoming an auditing student at the particular institution. The Court finds, as a matter of law, therefore, that this "component unit" theory serves as valid alternative basis for concluding that Plaintiff has never satisfied the requirements for qualifying as a "student" under FERPA.

Finally, the Court in accordance with

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) finds that it is proper to dismiss Plaintiff's pendant state law claims arising under the Texas Open Records Act and the Texas Constitution.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Defendants' Motion for Dismissal and/or Summary Judgment as supplemented by Defendants' Motion to Dismiss Plaintiff's Amended Complaint is hereby GRANTED. IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment is hereby DENIED.

SIGNED and ENTERED this 28th day of November, 1988.

s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-1161

Summary Calendar

D.C. Docket No. CA-A-88-071

MARK TARKA,

Plaintiff-Appellant,

versus

G. CHARLES FRANKLIN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before GEE, DAVIS, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the

record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this court.

December 29, 1989

ISSUED AS MANDATE: (*motion for stay submitted for consideration 1/24/90*)